SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 284

PETER AUGUSTUS BENDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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PETER AUGUSTUS BENDER,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1970; Petition for Rehearing denied May 21, 1970. See Appendix B to this Petition.

The Petition for Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Constitutional questions are presented, involving both the First and Fifth Amendments: May an administrative agency validly promulgate a regulation [32 C.F.R. § 1625.2] that creates a deadline for filing information of a new status (in this case a status involving religion and conscientious belief) despite the absence of any time limitation set by the Act of Congress?

This was raised in the trial court, by Motion for Judgment of Acquittal and in the Court of Appeals, by briefing.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1625.2 and § 1622.30. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Bender with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2]

Bender pleaded "not guilty" and was tried by the Honorable E. Avery Crary, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence.

6. THE FACTS

The facts are found in two places: (1) The complete Selective Service System file of the appellant[1] and (2) the oral testimony in the trial court found in the Reporter's Transcript of Proceedings.[2]

Petitioner registered with Local Board No. 125, Milton, Mass., May 15, 1961 [Ex. 2]. On January 14, 1964, he was classified I-A. Petitioner was later classified II-S [Ex. 13]. In 1966 he was again classified I-A. On April 13, 1967 the Appeal Board for Massachusetts classified him II-A [Ex. 42]. During this period he was a VISTA volunteer [Ex. 43]. On January 1, 1968, petitioner was classified I-A and on March 21, 1968, he was classified I-A by the California Appeal Board [Ex. 13].

On April 4, 1968, petitioner was mailed an Order to Report for Induction [Ex. 81]. On April 8, 1968, he requested SSS Form 150 for conscientious objectors and returned it to the Board (Ex. 82, 94-111). The Local Board declined to reopen petitioner's classification and he refused to submit to induction [Ex. 14].

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1. This file, Government's Exhibit 1, is pencil paginated at the bottom of each sheet and is hereafter referred to by sheet number.

2. RT. refers to the Reporter's Transcript of Record.

7. REASONS FOR GRANTING WRIT

A national decision is required on the constitutional problems present, ones that involve whether the Act of Congress giving conscientious objectors a draft status, and without time limitation for presentation, may be thwarted by an administrative regulation that creates a deadline for presentation of a new status.

Also involved is a consideration of the "in limbo" problem where one agency (the Selective Service System) will not consider a claim of new status presented to it after its deadline, the Order to Report for Induction, and the regulation of another linked-in-the-processing agency (the United States Army) will "not entertain" an application for separation, based on the status of conscientious objection, where such status had been presented to the Selective Service System.

8. ARGUMENT

I

Tension Between Act and Agency Regulation

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud*, 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Supreme Court declared in *Koshland* v. *Helvering*, 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are unambiguous and its directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim, for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. . . ." [DoD Directive No. 1300.6]

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regard to conscientious objectors, it is submitted that 32 C.F.R. § 1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *Seeger* v. *United States,* 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

Although we are not here dealing with an *Ehlert*-type situation the rationale is much the same: the conflict between the "open-end" Act of Congress and the deadline setting agency regulation.

The majority opinion in the "controlling" case, *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ....., 2 SSLR 3495, recognizes that many of the Courts of Appeals differ on this point and states

> "Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959)."

The minority opinion in *Ehlert*, Judge Merrill speaking, with the four other dissenting circuit judges concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. § 456 (j), provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to enter-

tain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 391, 80 L.Ed. 528 (1936); *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President ex-

ercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[3] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In regard to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Section 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regard to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. § 1625.2 is contrary to the statute and hence invalid.

II

Some Draft Cases Already Support the View That This Act Must Take Precedence Over § 1625.2

There is no need to recite *Gearey* or similar opinions for they are listed in the majority's slip opinion, on page 333, *Ehlert* v. *United States*, 9 Cir., 1970, 422 F.2d 332.

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3. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

One not listed gives the rationale well:

The facts of it are that on January 29, 1951, a registrant named Clark mailed to the board a request for appeal from their ruling on his claim. This notice was received by the board on February 3, 1951. Prior thereto, on February 2, 1951, the board mailed a notice to the defendant to report for induction [p. 614].

The opinion says:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted." *United States* v. *Clark,* W.D.Pa., 1952, 105 F.Supp. 613, 615.

III

The Denials of Due Process

A. The I-O Claim.

In a recent case the Second Circuit Court of Appeals stated:

". . . despite the inconvenience occasioned by the reopening of a registrant's classification after he has

> been called for induction, a registrant whose conscientious objections crystallize only after the issuance of an induction order and who presents his request for classification as a conscientious objector at the earliest possible time, is entitled to have his classification reopened and considered anew." *United States* v. *Holmes*, No. 32788 (C.A. 2, Jan. 12, 1970).

Petitioner Bender presented his prima facie claim for his conscientious objector status at the earliest possible time after his crystallization. Not only did the Selective Service System local board refuse to reopen, but it did not invite petitioner to appear before it to discuss his claim.

The policy of the Selective Service System is that if the local board determines that it cannot grant a I-O claim then "the local board should invite or request the registrant to meet with it for an interview. . . ." *Local Board Memorandum No. 41* (Issued Nov. 30, 1951, Amended July 30, 1968). This petitioner's local board did not do.

Surely to recommend that the local boards grant interviews to I-O claimants and then to permit certain boards not to grant interviews violates due process of law and is contrary to the Fifth Amendment.

As the Court stated in *MacMurray* v. *United States*, 9 Cir., 1954, 330 F.2d 928 at 932, 934:

> "Denial of inquiry and hearing is fatal to the validity of an induction order unless it appears beyond doubt that the registrant's objections are based upon, in the words of §456 (j) 'essentially political, sociological, or philosophical views or a merely personal moral code'."

The Court then concluded:

> "Since appellant was denied a hearing with respect to the character of his objections on a record

> which did not on its face establish clearly and incontrovertibly that his objections were nonreligious in character his conviction cannot stand."

This is the position of petitioner in the matter before this court.

Several of the Circuit Courts are in agreement with petitioner's contentions. In *United States* v. *Holmes,* supra, it was held by the Second Circuit that a registrant's oral claim of conscientious objection status on the very date of induction at the induction station must be considered by the local board. The Seventh Circuit Court of Appeals held that due process was denied when the local board did not consider the conscientious objector claim of a registrant filed one day prior to his induction date. *United States* v. *Shermeister*, No. 17482 (C.A. 7, Jan. 21, 1970) 2 SSLR 3492.

Some courts have held that for the local board to consider a conscientious objector claim submitted by a registrant without reopening violates due process. As Chief Judge J. Nichol stated in *United States* v. *Melrose,* CR68-124S (D.S.D., Dec. 4, 1969), 2 SSLR 3482:

> "By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision, as the determination not to reopen is not appealable. . . . However, a reopening and consequent determination of the claim on the merits gives the defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, supra. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, supra. The board cannot actually determine the claim on the merits, de-

cide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967)."

B. The II-A Claim.

Petitioner was in an occupation that was thought worthy of a II-A classification [Ex. 42]. He was a member of VISTA, and was a VISTA volunteer [Ex. 37]. When he was classified I-A, he appealed, desiring an occupational deferment. The Appeal Board for Massachusetts recognized the legitimacy of his claim and so classified Bender II-A [Ex. 42].

It stands to reason, when man is once in an occupation that is thought worthy of a II-A, and then becomes even more valuable in it (as petitioner did), that unless there is some showing that he hasn't presented his case correctly, or that there is evidence that the law, or national needs, has changed, he should be retained in it.

Yet while the Appeal Board for Massachusetts granted him a II-A, the Appeal Board for California refused to grant him a II-A and classified him I-A after he had become much more valuable [Ex. 79].

Bender had become Program Officer for Mid-California and Nevada for the VISTA Division of the Office of Economic Opportunity, yet in March, 1968 the Appeal Board for California classified him I-A [Ex. 73, Ex. 79]. This despite the fact that an official communication was received by the Board concerning Bender's more valuable status in VISTA. To the Appeal Board for Massachusetts Bender was a II-A, but not to the Appeal Board for California, even though he was now more valuable to the national interests.

The Selective Service Regulations provided that if such is warranted, a registrant may be continued in II-A:

"§ 1622.21 Length of Deferments in Class II.—

* * *

(b) At the expiration of the period of a registrant's deferment in Class II, his classification shall be reopened and he shall be classified anew in the manner provided in part 1625 of this chapter. The registrant may be continued in Class II for a further period of one year or less if such classification is warranted. The same rules apply when classifying a registrant at the end of each successive period for which he has been classified in Class II."

Congress intended that the national economy should be protected by occupational deferment [RT. 10]. Bender, by his service in VISTA, was contributing to the welfare of the nation. He qualified for the II-A classification. Despite the prima facie case presented, the Selective Service System arbitrarily, and contrary to law, denied appellant a II-A occupational deferment. Hence the conviction should not stand.

Howze v. *United States*, 9 Cir., 409 F.2d 27, 28;

Petrie v. *United States*, 9 Cir., 407 F.2d 267, 281.

CONCLUSION

For the above given reasons certiorari should be granted and the judgment should be reversed.

Respectfully submitted,

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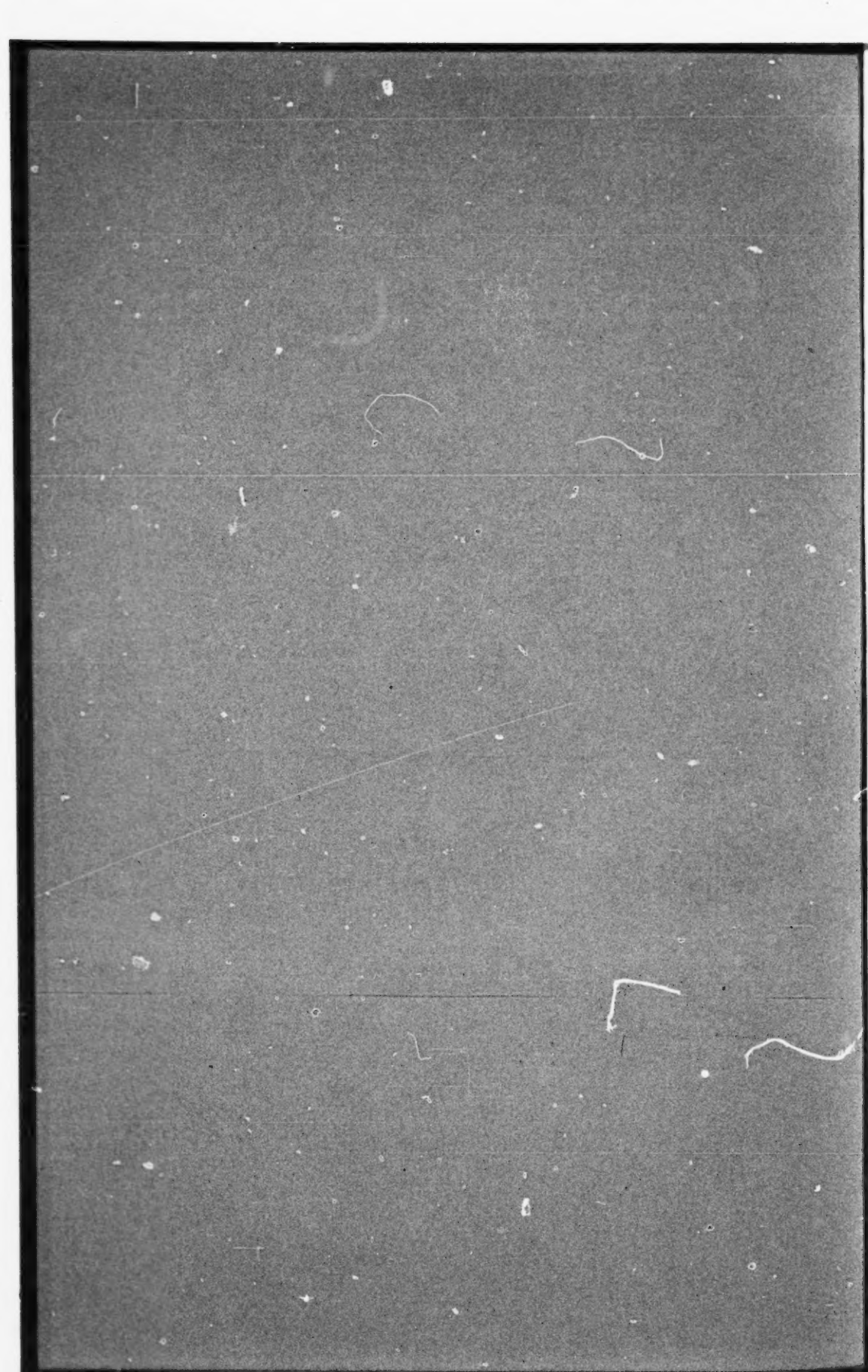

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER AUGUSTUS BENDER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 24,312

ORDER

[April 29, 1970]

Appeal from the United States District Court
for the Central District of California

Before: CARTER and HUFSTEDLER, Circuit Judges, and VON DER HEYDT,* District Judge

PER CURIAM:

The facts are not complex. Appellant Bender, in January, 1968, was classified I-A by his local draft board. On April 4, 1968, he was ordered to report for induction. On April 8, 1968, he wrote the local board claiming status as a conscientious objector, and simultaneously wrote General Hershey, Director of Selective Service, the California State Director, and the State Director of Massachusetts, the state of his local board. In none of these letters did he mention his conscientious objector application of even date.

*Hon. James A. von der Heydt, United States District Judge for the District of Alaska, sitting by designation.

The local board denied his application without reopening his case. His induction into the Armed Forces was postponed until May, 1968, at which time he reported and refused induction. Following indictment, he was convicted by the Court without a jury of failure to submit to induction. This appeal followed.

Three primary issues are raised:

1. Basis in fact for denial of conscientious objector status.

2. Lack of procedural due process.

3. Basis in fact for termination of occupational deferment.

This appeal raises no issue which has not been covered fully in prior appeals to this court. Based upon existing authority of this Circuit,

IT IS ORDERED:

Affirmed.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER AUGUSTUS BENDER,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 24,312

ORDER

(Filed May 2, 1970)

Before: CARTER and HUFSTEDLER, Circuit Judges, and VON DER HEYDT, District Judge

The Petition for Rehearing is denied.

APPENDIX C

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Act

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Regulations

A. Reopening

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the

government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

B. Class II

1622.20 General Rules for Classification in Class II.— (a) On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities. It is in the national interest and of paramount importance to our national security that civilian activities which are contributing to the national health, safety, or interest should be disrupted as little as possible, consistent with the fundamental purpose of the Military Selective Service Act of 1967.

(b) No deferment from training and service shall be made in the case of any individual except upon the basis of the status of such individual.

(c) The local board may avail itself of the assistance of all Federal, State, or local agencies to obtain informa-

tion which will help it to determine whether a claim for occupational deferment should be granted.

(d) No local board, appeal board, or other agency of appeal of the Selective Service System shall be required to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

1622.21 Length of Deferments in Class II.—(a)Class II deferments shall be for a period of one year or less. If there is a change in the registrant's status during the period of deferment in Class II, his classification shall be reopened and considered anew.

(b) At the expiration of the period of a registrant's deferment in Class II, his classification shall be reopened and he shall be classified anew in the manner provided in part 1625 of this chapter. The registrant may be continued in Class II for a further period of one year or less if such classification is warranted. The same rules shall apply when classifying a registrant at the end of each successive period for which he has been classified in Class II.

(c) Nothing in this section shall be construed to require the local board to retain in Class II any registrant when the reason for his occupational classification has ceased to exist.

1622.22 Class II-A: Registrant Deferred Because of Civilian Occupation (Except Agriculture and Activity in Study).—(a) In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment, or whose continued service in an office (other than an office described in section 1622.41) under the United States, or any State, Territory, or possession, or the District of Columbia, or whose activity in research, or medical, scientific, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest.

(b) In Class II-A shall be placed any registrant who is preparing for critical skills and other essential occupations as identified by the Director of Selective Service upon the advice of the National Security Council.

1622.23 Necessary Employment Defined.—(a) Except as otherwise provided in paragraph (b) of this section, a registrant's employment in industry or other occupation, service in office, or activity in research, or medical, scientific, or other endeavors, shall be considered to be necessary to the maintenance of the national health, safety, or interest only when all of the following conditions exist:

(1) The registrant is, or but for a seasonal or temporary interruption would be, engaged in such activity.

(2) The registrant cannot be replaced because of a shortage of persons with his qualifications or skill in such activity.

(3) The removal of the registrant would cause a material loss of effectiveness in such activity.

(b) A registrant's activity as an apprentice in an apprentice training program may be considered to be nec-

essary to the maintenance of the national health, safety, or interest when all of the following conditions exist:

(1) The apprentice training program meets the standards and requirements prescribed by the Director of Selective Service based upon the recommendations of the Secretary of Labor.

(2) The program has been accepted by the Director of Selective Service for deferment purposes.

(3) The registrant has satisfactorily completed in the program a minimum amount of training prescribed by the Director of Selective Service.

(4) The registrant is satisfactorily pursuing his training in the program and meeting the requirements, and standards of performance prescribed by the Director of Selective Service.

(c) The Director of Selective Service may from time to time, upon the advice of the National Security Council, identify needed professional and scientific personnel and those engaged in and preparing for critical skills and other essential occupations.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 284

PETER AUGUSTUS BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly failing and refusing to be inducted into the Armed Forces as ordered, in violation of 50 U.S.C. App. 462 (I R. 2-3, 20, 27). On March 24, 1969, he was sentenced to imprisonment for three years pursuant to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (I R. 28). On appeal the conviction was affirmed (Pet. App. 1-2).

The government's evidence at trial consisted of petitioner's Selective Service file,[1] which showed that on May 15, 1961, petitioner registered with Local Board No. 125, Milton, Massachusetts. When he completed his classification questionnaire on October 21, 1963, he made no claim to be a conscientious objector (F. 10). On January 14, 1964, he was classified I-A; from February 1964 until February 10, 1966, he was classified II-S (student deferment); he was then reclassified I-A (F. 13).

On February 25, 1966, and March 10, 1966, the local board received written notice from petitioner and the Office of Economic Opportunity, respectively, that he had been accepted for one year's service in VISTA (Volunteers in Service to America) (F. 24-26). On March 25, 1966, the local board classified petitioner I-A; this classification was changed by the State Appeal Board in Massachusetts on May 13, 1966, to II-A (occupational deferment) until April 13, 1967 (F. 13, 31, 42, 46).

On May 11, 1967, the local board extended petitioner's II-A classification until April 1968 (F. 13). After being advised on December 20, 1967, by the Office of Economic Opportunity that petitioner had terminated his services with VISTA (F. 53), the local board reclassified petitioner I-A on January 11, 1968 (F. 13). Petitioner appealed and on March 21, 1968, the appeal board voted 4-0 to continue his I-A classification (F. 13, 79).

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[1] We are filing with the Clerk of this Court a copy of petitioner's Selective Service file, to which we refer as "F."

On April 4, 1968, the local board ordered petitioner to report for induction on April 19, 1968, at Milton, Massachusetts (F. 13, 81). On April 8, 1968 (after receipt of his induction notice), petitioner wrote a letter to the local board claiming to be a conscientious objector, requesting an SSS Form 150, and asking for a personal appearance before the board (F. 82). On that same day, petitioner wrote letters and requested intervention in his case by the National Director of Selective Service (F. 84-85), the State Selective Service Director in Massachusetts (F. 86-87), and the State Selective Service Director in California (F. 88-89). In none of these three letters did petitioner mention conscientious objection.

On April 10, 1968, the local board notified petitioner that his induction was postponed until May 21, 1968 (F. 93, 131). On April 22, 1968, petitioner returned his SSS Form 150 with attached letters (F. 94-116). These documents stated, *inter alia*, that petitioner had attended religious schools (except for a three-year period) prior to going to Boston University. Petitioner further stated: "This religious training has been a major influence in the establishment of my feelings, values, and convictions. * * * The religious training acquired here, based on Christian Love, compassion and understanding, coupled with the guidance provided by my mother and father have been the sources from which I acquired the belief which is the basis of my claim in Series I above. * * * It has been this background and upbringing that fostered my feelings for the love and feeling for others" (F. 99). Petitioner also detailed his VISTA

activities (F. 102, 110-116). On April 26, 1968, the local board notified petitioner that the conscientious objector information submitted did not warrant a reopening of his classification (F. 14, 132). The board specifically found that petitioner's beliefs after receipt of the induction order were "no different than before," and by a vote of 5-0 voted not to reopen his classification (F. 128).

On April 30, 1968, the Massachusetts State Headquarters notified petitioner that neither that office nor the California State Headquarters felt that his VISTA employment (which he had resumed in 1968) warranted intervention on their part (F. 133). On May 17, 1968, petitioner requested transfer to a California local board to report for induction on a date it would fix (F. 139). The transfer request was granted, and on May 29, 1968, a local board in Los Angeles ordered him to report for induction on June 11, 1968 (F. 143). Petitioner reported to the induction center in Los Angeles on that date, but refused to submit to induction (F. 150-151).

At trial petitioner testified that at the time he filled out his classification questionnaire he was not a conscientious objector (II R. 4-5, 12.) He testified that his C.O. beliefs did not mature until after he received his induction order (II R. 13, 15). In its findings the trial court stated (II R. 21, 23-24):

> * * * None of the letters nor anything in Form 150 indicates that Mr. Bender's conscientious objection crystallized after April 4, 1968 [date of the induction order]. All the information indicates, as I interpret it, that his conscientious ob-

> jection to war existed prior to April 4, 1968, and well prior. The Board in a five to nothing decision decided not to reopen the matter with respect to the claim of conscientious objection, and that was on April 25th. In their letter denying the reopening they state that they found Mr. Bender's belief after the Induction Order to be no different than before.
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> * * * * *
>
> So I do not find that the record before the Board establishes the fact of conscientious objection belief on the part of Mr. Bender that matured or crystallized after the induction order was received. I find there was basis in fact in the record for the conclusion of the Board and that the defendant is guilty as charged.

1. As noted, due to petitioner's work in the VISTA program, he was reclassified from I-A to II-A in May 1966 by the Massachusetts appeal board (F. 13, 42, 46), and, in May 1967, his II-A classification was extended until April 1968 (F. 13). On January 11, 1968, the local board reclassified petitioner I-A, after being advised by the Office of Economic Opportunity that petitioner had terminated his services with VISTA (F. 13, 53). On March 21, 1968, the California appeal board affirmed the I-A classification (F. 13), and both the California and Massachusetts State Headquarters refused to intervene on petitioner's behalf (F. 133).

There is no substance to the claim (Pet. 14-15) that petitioner was improperly deprived of a continuation of his II-A classification. Petitioner had in effect already received a two-year deferment because of his

VISTA employment; no additional period of deferment was mandatory since there was no showing in the administrative record that petitioner could not "be replaced because of a shortage of persons with his qualifications or skill in such activity"—an essential condition necessary for such deferment (32 C.F.R. 1622.23(2); Pet. App. 7).[2] See *Petrie* v. *United States*, 407 F. 2d 267, 275-276 (C.A. 9); *United States* v. *Weersing*, 415 F.2d 130, 133 (C.A. 9), certiorari denied, 396 U.S. 987. In this regard, it is also significant to note that petitioner testified at the trial that he refused induction only on the ground of denial of his conscientious objector claim, not on the basis of denial of a II-A classification (II R. 13-14).

2. Petitioner's claim to classification as a conscientious objector was rejected under 32 C.F.R. 1625.2—which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless the board specifically finds that there has been a change in his status resulting from circumstances beyond his control—because he raised the C.O. claim only after he received his induction notice, even though it was clear that his beliefs had matured *prior* to that time. As we pointed out in our Memorandum in *Posner* v. *United States*, No. 151,

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[2] 32 C.F.R. 1622.1(c) provides that "[e]ach registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board."

this Term,[3] despite the divergence of views in the circuits on the late crystallization issue, the courts of appeals are uniform in holding that when a timely claim is not made (the situation in the instant case), the exemption may be denied on that basis alone. We recognize, however, that the Court has recently granted review in *Ehlert* v. *United States*, No. 120, this Term, certiorari granted, May 4, 1970, to consider the question whether maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening. Accordingly, the Court may wish to defer action on the instant petition pending its decision in *Ehlert*.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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[3] We are providing petitioner's counsel with a copy of our Memorandum in *Posner*.

[4] Petitioner's contention that the congressional creation of a conscientious objector classification permits no administrative rule setting a deadline for the assertion of matured claims (Pet. 5-10) finds no support in the case law, including the dissent in *Ehlert*. See our Memorandum in *Posner*, *supra* p. 6, n. 4.

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